

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2019-184-E**

IN RE:	)	
South Carolina Energy Freedom Act	)	
(H.3659) Proceeding to Establish	)	
Dominion Energy South Carolina,	)	
Incorporated's Standard Offer, Avoided	)	<b>DOMINION ENERGY SOUTH</b>
Cost Methodologies, Form Contract	)	<b>CAROLINA, INC.'S</b>
Power Purchase Agreements,	)	<b>MOTION TO STRIKE FINAL REPORT</b>
Commitment to Sell Forms, and Any	)	<b>OF POWER ADVISORY, LLC</b>
Other Terms or Conditions Necessary	)	
(Includes Small Power Producers as	)	
Defined in 16 United States Code 796, as	)	
Amended) - S.C. Code Ann. Section 58-	)	
41-20(A)	)	

Dominion Energy South Carolina, Inc. (“DESC” or the “Company”), by and through its undersigned counsel and pursuant to 10 S.C. Code Ann. Regs. 103-829, hereby submits this Motion to Strike the Independent Third Party Consultant Final Report Pursuant to South Carolina Act 62 (the “Report” or “Power Advisory Report”) submitted by Power Advisory, LLC (“Power Advisory”) on November 4, 2019. As set forth herein, the Public Service Commission of South Carolina (the “Commission”) should strike the Report because it is outside the bounds established for such a report under S.C. Code Ann. § 58-41-20(I), it provides material that is entirely outside of the permissible scope of expert opinions under any circumstances, and it seeks to unlawfully supplant the role of the Commission in evaluating the credibility of witnesses, the evidentiary burdens of the parties and the conduct of discovery.<sup>1</sup>

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<sup>1</sup> DESC recognizes that because the Commission is prohibited from communicating with Power Advisory throughout the course of these proceedings, the Commission had no means to ensure that Power Advisory remained within the proper scope of its role and authority. S.C. Code Ann. § 58-41-20(I).

DESC raises no objection to an independent expert providing the Commission with an independent calculation of an avoided cost rate for DESC as envisioned by Act No. 62 and subject to appropriate limitations and safeguards. But no such calculation has been provided here. Instead, the Report is entirely outside of the bounds established for such a report under S.C. Code Ann. § 58-41-20(I), and of expert testimony generally. For that reason, DESC objects to the inclusion of the Report in the record in this case or to it being considered by the Commission. Additionally, this improper and uncross-examined report should be stricken from the record as a violation of the parties' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution; Article I, Section 22 of the Constitution of the State of South Carolina; and the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 *et seq.*

Contemporaneously with this Motion, DESC is filing its Comments in Response to the Power Advisory, LLC Report, as provided for in Order No. 2019-111-H. This Motion incorporates by reference all arguments made in DESC's Comments in Response to the Power Advisory, LLC Report.

### **INTRODUCTION**

During the consideration of Act No. 62 of 2019, it was proposed that a docket be opened before the Commission "for the purpose of establishing each electrical utility's standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other terms or conditions necessary to implement this section." S.C. Code Ann. § 58-41-20(A). It was further proposed that the Commission "engage, for each utility, a qualified independent third party to submit a report that includes the third party's *independently derived conclusions* as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section." S.C. Code Ann. § 58-41-20(I)

(emphasis supplied). During the legislative process that led to the adoption to Act No. 62, DESC did not object to these provisions of Act No. 62. Likewise, DESC does not do so now. It does, however, object to how S.C. Code Ann. § 58-41-20(I) has been applied by Power Advisory in creating a report that does not provide an independently derived conclusions as to the proper calculation of DESC's avoided costs, but instead seeks to insert itself into this docket as an "expert" decision maker, weighing the credibility of witnesses, deciding whether or not evidentiary burdens have been met, seeking to provide opinions on discovery disputes to which it was not a party and supplanting the role and authority of the Commission. This is far outside the scope of what S.C. Code Ann. § 58-41-20(I) envisions.

The Report, totaling 76 pages, largely summarizes or quotes—quite selectively—various pieces of conflicting testimony from the hearing, then offers Power Advisory's opinion on the weight of that testimony, often concluding which party's testimony it "believes." The Report makes no effort to provide the independent calculation of avoided costs that S.C. Code Ann. § 58-41-20(I) envisioned; rather, it seeks to provide "expert" opinions weighing the evidence, deciding whether or not evidentiary burdens have been met, and bolstering or undermining the testimony of other experts. The Report itself acknowledges this failure, recommending to the Commission with respect to a critical determination in this case that it should, "as provided for in Act 62, . . . initiate a study with an independent consultant to assess DESC's solar integration costs." Report at iii. Given this admission, and for the reasons stated, the Power Advisory Report is inappropriate and should be stricken from the record.

### **ARGUMENT**

Section 58-41-20(I) states, in part, that

The commission shall engage, for each utility, a qualified independent third party to submit a report that includes the third party's *independently derived conclusions*

as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section.

S.C. Code Ann. § 58-41-20(I) (emphasis added).

The statute clearly envisions a third party consultant who submits its own independent analysis showing an appropriate avoided cost calculation for each utility. Power Advisory did nothing of the sort. No calculation of an avoided cost for DESC's system was performed. Bare expert opinions without underlying supporting facts are of no consequence and cannot be considered. *See S.C. Cable Television Ass'n v. Pub. Serv. Comm'n of S.C.*, 313 S.C. 48, 53, 437 S.E.2d 38, 40–41 (1993) (“[w]e caution the PSC that its decisions must be based on facts in evidence and not merely on expert opinions which are not supported by facts.”). Indeed, rather than relying on underlying facts, Power Advisory sought to set itself up as an alternative decision maker providing conclusions as to credibility of witness testimony, determinations as to whether or not parties had met evidentiary burdens, and other purely legal determinations, all while being insulated from the need to appear at the hearing and submit to cross examination by the parties.

Furthermore, the report does not constitute permissible expert testimony. Expert testimony cannot be admitted for the purpose of undermining or bolstering a witness's credibility. *See Newkirk v. Enzor*, No. CV 2:13-1634-RMG, 2017 WL 823553, at \*4 (D.S.C. Mar. 2, 2017) (excluding testimony of an expert as improper that simply bolstered the credibility of a witness); *Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir. 2005) (“[e]xpert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702.”). Likewise, expert testimony cannot provide a legal opinion. *See Hermitage Indus. v. Schwerman Trucking Co.*, 814 F. Supp. 484, 484 (D.S.C. 1993). The Power Advisory Report does both. As an example, it states that “Power Advisory agrees with Mr. Horii [of the Office of Regulatory Staff] and Mr. Burgess [of the Solar Builders Alliance]....”

Report at 42. Such language, used throughout the Report, is clearly meant to bolster the testimony of those parties.

Similarly, expert testimony cannot weigh evidence or determine if some has met a burden of proof. But throughout its Report, Power Advisory makes statements like the following: “DESC has not provided convincing evidence....” *Id.* at 19. “[N]one of the three standards used by DESC . . . have been adequately justified . . .” *Id.* at 15. On pages 35-36, the Power Advisory Report presumes to opine on discovery disputes. The Report selectively quotes complaints concerning discovery matters that were resolved to the satisfaction of all parties before the hearing and on that basis determines that DESC did not provide sufficient transparency. Power Advisory, however, affirms that as to its own discovery matters, “DESC cooperated as would be expected.” *Id.* at 5. Nonetheless, apparently based on discovery matters to which it was not a party and which were satisfactorily resolved between the parties, Power Advisory Group criticizes DESC for having a defective “spirit” of cooperation in the proceeding. *Id.* at 5. Apparently, judging the spirit of parties based on testimony by interested opponents is within the unique competency of the Power Advisory Group.

Any of these reasons would support finding the Power Advisory Report inadmissible for consideration.

To be clear, DESC still does not object to employment of a third party consultant to provide an independent calculation of avoided cost. However, Power Advisory did not limit itself to this role and did not perform its statutory obligation.

## CONCLUSION

Based on the foregoing, DESC respectfully requests that the Commission grant DESC's Motion to Strike the Independent Third Party Consultant Final Report Pursuant to South Carolina Act 62.

Respectfully submitted,

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